

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS CHARLES KENDRICKS,

Defendant-Appellant.

UNPUBLISHED

March 24, 2005

No. 251882

Oakland Circuit Court

LC No. 2001-178867-FH

Before: Zahra, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for third-degree child abuse, MCL 750.136b(5). We affirm defendant's conviction, but vacate the order of restitution.

Defendant first argues that the trial court erred by not hearing his motion to quash the information before trial. Defendant waived this issue because he withdrew the motion before the date set for hearing; accordingly, the trial court did not err. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next contends that the prosecution did not exercise due diligence to produce endorsed witnesses, specifically two of defendant's children, Jasmine and Christine, for trial. We disagree. Whether the prosecutor has exercised due diligence in attempting to obtain a witness is a matter of reasonableness and depends on the facts of each case. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The trial court's decision on the issue is reviewed for an abuse of discretion. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995).

If a prosecutor endorses a witness, he is obliged to exercise due diligence to produce that witness at trial. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). But the prosecution may be excused from the duty by showing that the witness could not be produced despite the exercise of due diligence. *Id.* Due diligence is the attempt to do everything reasonable, not everything possible, to secure the presence of a witness at trial. *People v Cumming*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Here, the prosecution presented evidence that substantial efforts were made to locate Christine and Jasmine. Oakland County Deputy Clay Jansson testified that the Oakland County Sheriff's Department was willing to do anything necessary to get the girls back to Michigan for the court appearances, including traveling to another state to get them, but defendant and his wife would not cooperate. Therefore, the prosecution exercised due diligence in attempting to locate the witnesses.

Defendant next raises an ineffective assistance of counsel claim premised on several grounds, none of which warrant a new trial. Because there was no *Ginther*¹ hearing, our review is limited to mistakes apparent on the record. *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error and its constitutional determination de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's performance fell below an objective standard of reasonableness and a reasonable probability that the outcome of the trial would have been different but for trial counsel's error. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.*

First, defendant argues that his trial counsel was ineffective because he did not object to the admission of inadmissible hearsay testimony that identified him as the source of his daughter's bruises. Whether the evidence constituted inadmissible hearsay must first be determined, with the trial court's decision reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

Hearsay is inadmissible unless it is subject to an established exception. MRE 802. Here, defendant alleges that his daughter Jasmine's statements to FIA employees, Jacinda Jones and Tracy Van Houghten, were improperly admitted at the trial through these witnesses. The hearsay statements were admitted under the "catch-all" exception, MRE 803(24). Evidence admitted under MRE 803(24) must satisfy four elements: "(1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on the fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice." *People v Katt*, 468 Mich 272, 279; 662 NW2d 12 (2003).

Here, considering the totality of the circumstances surrounding the statements, we conclude that they were sufficiently trustworthy. See *Id.* at 291 n 11. Factors that led to this conclusion of reliability include that Jasmine made the statement while away from her parents and before they knew about the child abuse investigation, she made a statement—which was based on her personal knowledge—about two days after the occurrence and she made another consistent statement about two weeks later, the statements were clear, detailed, and factual, and Jasmine had no motive to fabricate what happened to her younger sister. Although we note that Jasmine's statements appeared to be in response to questioning by the FIA employees regarding Christine's bruises, there is no evidence that the questioning was suggestive in any way or that Jasmine felt pressured or coached into disclosing what happened. Further, the statements tended to establish what happened to Christine, a material fact. The statements were the most probative evidence of this material fact that the prosecution could offer in light of defendant's refusal to produce Jasmine, his minor child and the declarant, for in-court testimony as discussed above.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

And the general purpose of the hearsay rules, as well as the interests of justice are best served by the admission of these statements. In sum, the trial court did not abuse its discretion in admitting these statements. Therefore, defendant's counsel was not ineffective for failing to object to their admission.

Next, defendant argues that his trial counsel was ineffective for failing to object to the admission of a police dispatch report, which was inadmissible hearsay. We disagree. The routine data included in the report, including the place and time of the call, was admissible under MRE 803(6) as a record of regularly conducted activity or under MRE 803(8) as a public record. See, e.g., *People v Stacy*, 193 Mich App 19; 484 NW2d 675 (1992). However, the caller's description of the incident contained in the police dispatch report is hearsay within hearsay and must separately conform to a hearsay exception. MRE 805. It does not qualify as a present sense impression because there is no indication that the call was made "while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1). The caller's description of the event was inadmissible hearsay. Nonetheless, defendant failed to establish that admission of this hearsay was outcome-determinative because it does not name defendant and does not name a victim. Therefore, trial counsel was not ineffective for failing to object to its admission.

Defendant's next claim of ineffective assistance is that his counsel elicited inadmissible hearsay statements on cross-examination of a witness. We disagree. Trial counsel's strategy in eliciting the hearsay was soundly aimed at attacking the declarant's credibility. See *Ackerman, supra* at 455.

Finally, defendant argues that his counsel was ineffective for failing to discover a medical examination performed on Christine two weeks after the alleged abuse. He also argues that the prosecutor committed misconduct by not turning over this evidence before trial. We disagree. These arguments have no merit. It is clear from the record that defendant possessed the results of the medical examination as early as September 2002, almost a year before trial. In sum, defendant has failed to overcome the presumption that he received the effective assistance of counsel. See *Dixon, supra*.

Defendant next charges that the trial court abandoned its mantle of impartiality and prejudiced the jury against defendant by making a comment that questioned defendant's credibility. We disagree. Defendant did not object at trial to the comment and, therefore, did not preserve the issue for appeal. See *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). This Court reviews unpreserved errors for plain error affecting defendant's rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 339; 543 NW2d 342 (1995).

At the start of defendant's testimony the following exchange occurred:

Defendant: I been waiting to tell the jury this story for twenty-seven months. I've been trying to get to court and trying to get to trial.

The Court: Enough. Enough. That is not true and I'm not going to have it. Thank you.

Defense Counsel: I will control my witness.

Defendant has not met his burden of showing that the court's brief comments unduly influenced the jury, deprived him of a fair trial, or were outcome-determinative.

Finally, defendant asserts, and the prosecution concedes, that the trial court erred when it ordered defendant to pay restitution to an assistant prosecuting attorney against whom defendant had filed a grievance. We agree. The compensatory nature of restitution is specifically designed to allow crime victims to recoup losses suffered as a result of criminal conduct. *People v Grant*, 455 Mich 221, 230; 565 NW2d 389 (1997). "Victim" is statutorily defined as an "individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." MCL 780.766(1). Because she was not harmed as a result of defendant's crime, the assistant prosecuting attorney was clearly not a victim for purposes of restitution. Therefore, she is ineligible to recover litigation expenses from defendant and such order is vacated.

We note that we have considered defendant's late-filed Standard 4 brief which included additional claims of ineffective assistance of counsel, as well as prosecutorial misconduct, and conclude that none of the issues warrant relief. In brief, defendant waived the right to confront his daughters in court when he failed to provide information as to their location and a *Miranda*² violation did not occur when defendant was asked where the children were located in attempt to secure their attendance at the trial. Defense counsel was not ineffective during the prosecutor's cross-examination of defendant because the question about defendant's attempts to remove judges from cases related to this matter was objected to by defense counsel and the objection was sustained, even though defendant interjected with "I don't mind answering that question;" the question about how many times defendant had been found in contempt of court was in response and rebuttal to defendant's testimony on direct exam that he had been waiting to tell the jury his story for twenty-seven months and had "been trying to get to court and trying to get to trial;" and the question about defendant having a driver's license while being blind was relevant to defendant's credibility. Further, defense counsel was not ineffective for failing to object during the prosecutor's closing argument which merely argued the evidence and all reasonable inferences arising from the evidence as related to the parties theories. See *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). In sum, neither ineffective assistance of counsel nor

² *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

prosecutorial misconduct denied defendant a fair trial. See *id*; *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Affirmed, but the order of restitution is vacated.

/s/ Brian K. Zahra

/s/ William B. Murphy

/s/ Mark J. Cavanagh